No. 80-1017

In the Supreme Court of the United States

OCTOBER TERM, 1980

EMMANUEL LOUCAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSTION

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QUESTIONS PRESENTED

1. Whether the government must prove that a defendant, charged with aiding and abetting a violation of the Travel Act, 18 U.S.C. 1952, had knowledge that the principal travelled in interstate commerce.

2. Whether the government must prove an actual violation of the predicate state statute in order to prove a violation of the Travel Act.

3. Whether the district court should have stricken for cause certain jurors at petitioner's trial.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 629 F. 2d 989.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a) was entered on September 26, 1980. A petition for rehearing was denied on October 27, 1980 (Pet. App. 21a). The petition for a writ of certiorari was filed on December 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of West Virginia, petitioner was convicted of violating the Travel Act, 18 U.S.C. 1952, by aiding and abetting travel in interstate commerce with intent to promote an illegal gambling operation. He was initially sentenced to two years' imprisonment, five years' probation, and a $5,000 fine. The district court subsequently reduced the period of confinement to six months (Pet. 5; Pet. App. 16a-17a).

1. The evidence at trial showed that on June 30, 1978, the sheriff of Hancock County, West Virginia, conducted a warrant-authorized search of a place of business owned by petitioner's co-defendant, Silvio Pinciaro. That search resulted in the seizure of various pinball and slot machines (C.A. App. 46-48, 135-163).[1]

Petitioner, serving as Pinciaro's attorney, appeared at a magistrate's hearing on July 27, 1978, to seek return of the pinball and slot machines (C.A. App. 49-51). In the courthouse, according to Hancock County Sheriff Ronald Donell, petitioner offered the sheriff a bribe if the sheriff would return the machines. Specifically, petitioner told the

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[1] "C.A. App." refers to the joint appendix filed in the court of appeals.

sheriff that his client wanted to "buy back" the seized slot machines from the sheriff (C.A. App. 103-105, 164). Petitioner also told the sheriff that he wanted his cooperation in forcing another local pinball machine operator to give up his pinball machine locations so that Pinciaro could place his machines at those locations (C.A. App. 106-107, 211-212).

Petitioner met with Sheriff Donell on six subsequent occasions between July and November of 1978 to discuss the "buy-back" of the slot machines and the arrangements for placing Pinciaro's pinball machines in desirable locations. Donell, who was cooperating with federal authorities, made tape recordings of several of those meetings (C.A. App. 109-116, 119-121). Finally, at their meeting on November 16, 1978, petitioner paid Donell $2,000 for the return of Pinciaro's slot machines. Three days later, on November 19, 1978, Pinciaro arrived at the sheriff's evidence vault in Hancock County, West Virginia, to retrieve his slot machines (C.A. App. 128-129). Pinciaro's home during this period was in Steubenville, Ohio (C.A. App. 204-206).

2. At trial, petitioner admitted participating in the "buy-back" scheme and in the negotiations for the pinball machine locations. His defense was that he was entrapped by the sheriff and the local prosecuting attorney. The jury acquitted petitioner on one count of conspiracy but convicted him on one count of aiding and abetting Pinciaro in violating the Travel Act, 18 U.S.C. 1952. The count on which petitioner was convicted charged that on November 19, 1978, he aided Pinciaro in travelling from Ohio to West Virginia with intent to carry on a gambling business, in violation of West Virginia law (C.A. App. 14).

The court of appeals affirmed petitioner's conviction (Pet. App. 1a-11). It held that the evidence was sufficient to support the jury's verdict on the Travel Act count. In particular, the court found that the evidence was sufficient to

show that petitioner had aided and abetted Pinciaro, through acts of bribery in recovering his slot machines, which he intended to use to dominate gambling activities in Hancock County (Pet. App. 8a).

ARGUMENT

1. Petitioner first contends (Pet. 7-8) that the court of appeals applied an improper standard in finding that the evidence was sufficient to uphold his conviction. Although the court of appeals did not discuss this issue, petitioner reasons that the court must have applied the law of the circuit, which does not require proof that an aider and abettor had knowledge that the principal travelled in interstate commerce. See *United States* v. *Le Faivre*, 507 F. 2d 1288, 1297 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975). Under the Sixth Circuit's rule, petitioner asserts, his conviction would have been set aside unless there was evidence showing that he was aware that Pinciaro travelled in interstate commerce. See *United States* v. *Prince*, 529 F. 2d 1108, 1112 (6th Cir.), cert. denied, 429 U.S. 838 (1976); *United States* v. *Alsobrook*, 620 F. 2d 139, 143-144 (6th Cir. 1980), cert. denied, No. 79-2061 (Oct. 6, 1980). Petitioner further contends that, applying the Sixth Circuit's standard, the reviewing court would necessarily have determined that the evidence was not sufficient to support the jury's verdict against him.[2]

As petitioner notes, there is a conflict among the circuits as to whether an aider and abettor of a Travel Act violation

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[2]In the district court, petitioner did not seek an instruction that would require the jury to find that he had knowledge of his co-defendant's interstate travel, and did not object to any instruction related to this issue that was given by the court. Moreover, petitioner did not challenge the district court's instruction on this issue in the court of appeals (see Brief for Appellant 11-12), and does not do so here. His claim in this Court is that, applying the proper legal standard, there was no evidence to support an inference that he was aware of his co-defendant's interstate travel.

must be aware that the principal has travelled or used interstate facilities. The Sixth Circuit requires proof of such knowledge. *United States* v. *Alsobrook, supra*; *United States* v. *Prince, supra*. Every other court of appeals that has addressed the issue has held that proof of such knowledge is not required. See *United States* v. *Barbieri*, 614 F. 2d 715 (10th Cir. 1980); *United States* v. *McPartlin*, 595 F. 2d 1321, 1361 (7th Cir.), cert. denied, 444 U.S. 833 (1979); *United States* v. *Perrin*, 580 F. 2d 730, 737 (5th Cir. 1978), aff'd on other grounds, 444 U.S. 37 (1979); *United States* v. *Sellaro*, 514 F. 2d 114, 120-121 (8th Cir. 1973), cert. denied, 421 U.S. 1013 (1975); *United States* v. *Le Faivre, supra* (4th Cir.); *United States* v. *Roselli*, 432 F. 2d 879, 891 (9th Cir. 1970). While this conflict may require resolution by this Court in the future, it is unnecessary to do so in this case because petitioner has not challenged the instructions under which the jury considered the case and because the evidence was sufficient to show that petitioner was aware that Pinciaro travelled in interstate commerce to promote a gambling operation. Since the evidence was sufficient on this issue, petitioner would not prevail in this case even if the minority rule of the Sixth Circuit had been applied by the court of appeals here.

The evidence at trial showed that Pinciaro lived in Steubenville, Ohio, and that his place of business (where the slot machines were seized) was in Weirton, West Virginia (C.A. App. 203-206). The Hancock County Sheriff's office also was located in West Virginia. Pinciaro's wife testified that he worked in West Virginia and left their home in Ohio each morning, crossing into West Virginia by one of the two bridges between Steubenville and Weirton (C.A. App. 204-205). He returned each evening after finishing his work in West Virginia (C.A. App. 205). The evidence further showed that petitioner was well aware of the nature of his client's business and worked with him in an illegal venture on a continuing basis. He stood in a position of trust with

respect to Pinciaro and negotiated repeatedly on his behalf with respect to the bribes and the placement of pinball machines. This evidence, viewed in its totality and in the light most favorable to the government, supports the inference that petitioner was aware that Pinciaro lived across the state line and would need to cross it to retrieve the evidence from the sheriff's vault. See *United States* v. *Barrow*, 363 F. 2d 62, 64-65 (3d Cir. 1966), cert. denied, 385 U.S. 1001 (1967). Accordingly, petitioner's conviction would have been upheld even under the Sixth Circuit's standard, and there is thus no need for this Court to review the judgment of the court of appeals in this case.

2. Petitioner next argues (Pet. 9-12) that the court of appeals erred by holding that the Travel Act can be violated without proof that there has been a completed violation of the predicate state statute. He asserts that, because mere possession of slot machines is not a violation of West Virginia law, the Travel Act could not have been violated since the government's proof did not show that Pinciaro had engaged in any gambling activities.

Petitioner takes an unduly narrow view of the Travel Act. The Act makes it unlawful for any person to travel in interstate commerce "with intent to * * * promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on" of one of a number of unlawful activities. 18 U.S.C. 1952(a)(3). In this case, the unlawful activity that petitioner and Pinciaro were charged with promoting or facilitating was a gambling operation, in violation of West Virginia law. The evidence at trial clearly showed that Pinciaro and petitioner engaged in a bribery scheme, and that Pinciaro travelled across state lines with the intent to promote a gambling operation.

Contrary to petitioner's contention (Pet. 11-12), the plain language of the Travel Act supports the construction

adopted by the court of appeals, not the contruction proposed by petitioner. The *corpus delicti* of the offense is interstate travel or use of interstate facilities. As applied to an offense such as the one in this case, the travel or use of interstate facilities must be done with intent to promote a business enterprise involving gambling in violation of state law, 18 U.S.C. 1952(a)(3), (b)(1). The plain language of the statute does not require that the state offense be completed—it requires only interstate activity joined with an intent to promote an enterprise involving a specified state offense. See *United States* v. *Pomponio*, 511 F. 2d 953, 957 (4th Cir.), cert. denied, 423 U.S. 874 (1975); *United States* v. *Peskin*, 527 F. 2d 71, 79 n.3 (7th Cir. 1975), cert. denied, 429 U.S. 818 (1976); *McIntosh* v. *United States*, 385 F. 2d 274, 276-277 (8th Cir. 1967); *United States* v. *Bergland*, 318 F. 2d 159, 161 (7th Cir.), cert. denied, 375 U.S. 861 (1963); *United States* v. *Azar*, 243 F. Supp. 345 (E.D. Mich. 1964); *United States* v. *Teemer*, 214 F. Supp. 952, 957-958 (N.D. W.Va. 1963).[3]

3. Petitioner finally argues (Pet. 12-15) that four jurors, who sat as jurors in an earlier gambling case stemming from the same overall investigation, should have been excused for cause. When they were not excused, petitioner used four of his peremptory challenges to remove them.

As the court of appeals stated, the decision whether to strike a juror for cause is a matter reposed within the discretion of the district court. Absent some indication of actual lack of impartiality, a juror is not disqualified merely because he or she previously served as a juror in a similar case, or a case involving some of the same witnesses. See

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[3]The statute also requires that, following the travel or use of interstate facilities, the defendant must engage in some act to promote or facilitate the promotion of the unlawful activity. That requirement was clearly satisfied in this case by Pinciaro's attempts to reclaim his slot machines from the custody of the sheriff.

Government of Virgin Islands v. *Williams*, 476 F. 2d 771, 773 (3d Cir. 1973); accord, *United States* v. *Carranza*, 583 F. 2d 25, 28 (1st Cir. 1978); *United States* v. *Drake*, 494 F. 2d 648, 649 (7th Cir. 1974).

In support of his claim, petitioner cites *United States* v. *Stevens*, 444 F. 2d 630 (6th Cir. 1971), and the dissenting opinion in *Casias* v. *United States*, 315 F. 2d 614 (10th Cir.) (en banc), cert. denied, 374 U.S. 845 (1963). Neither of those cases, however, offers him substantial aid. In *Stevens*, the court of appeals upheld the defendant's conviction even though the entire venire from which his jury had been selected had been present in the courtroom when a related case was tried and eight of the jurors in his case served on the jury in that related case. To be sure, the court observed that, as a general matter, "jurors should not be called to serve in cases involving witnesses or parties who participated in cases in which they were previously impanelled." 444 F. 2d at 632. However, the court determined that the jurors' prior exposure to the related case did not deprive the defendant of a fair trial. Likewise, in *Casias*, neither the prevailing nor the dissenting judges suggested that jurors who had participated in other similar cases are "ipso facto debarred from the jury box." 315 F. 2d at 621 (dissenting opinion). The question of prejudice is one to be determined during voir dire, and absent some proof of probable prejudice on the part of particular jurors, they should not automatically be stricken for cause.

In this case, the district court considered the relationship between petitioner's case and the earlier trial at which the four jurors had served (C.A. App. 74-75). The sheriff, who testified for the government in that case, testified for the

government in petitioner's case as well. And the two prosecutors who tried that case also tried petitioner's case.[4] Apart from those similarities, however, the cases were different in many respects: the statutory provisions were different (C.A. App. 73); the defendants were different; and the charges did not overlap (C.A. App. 74). The district court therefore concluded that any possible effect of prior exposure to government witnesses could be cured by appropriate instructions (C.A. App. 74-75). In light of the minimal risk of prejudice in this context, the district court correctly refused to strike the prospective jurors for cause.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1981

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[4]This is not an unusual situation. There are only four federal prosecutors in the Northern District of West Virginia. Only two of them work in the Wheeling, West Virginia office.

DOJ-1981-03